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Nos. 87-298 and 87-5366

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

DARREL PATERSON SIMPSON AND
ROBERT MACRINER ANDERSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ROBERT MACRINER ANDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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3 pp

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Petitioners contend that the court of appeals erred in reversing an order dismissing their indictment on due process grounds.

1. On March 1, 1984, petitioners were charged in an indictment returned in the United States District Court for the Central District of California with distribution of heroin, in violation of 21 U.S.C. 841(a)(l), and conspiracy to distribute heroin, in violation of 21 U.S.C. 846.

Before trial, petitioners moved to dismiss the indictment. On June 21, 1984, the district court dismissed the indictment on the ground that the FBI's conduct in recruiting and using informant Helen Miller – a prostitute, heroin user, and fugitive – was so offensive that it violated the Due Process Clause of the Fifth Amendment. The

court's conclusion was based on three considerations: (1) the manipulation of Miller into becoming an informant; (2) the continued use of Miller as an informant after learning that she had become sexually involved with petitioner Simpson; and (3) the "continued employment of Miller despite her known status as a heroin addict and prostitute, and despite her numerous arrests" (87-5366 Pet. App. B3-B4).

On the government's appeal, the court of appeals reversed (87-298 Pet. App. A1-A23; 87-5366 Pet. App. C1-C23). The court concluded that the "manipulation" of Miller into becoming an informant and the continued use of an informant who engaged in sexual intercourse with the suspect as well as in unrelated criminal activity was not so shocking as to violate the Due Process Clause.[1]

2. Petitioners contend (87-298 Pet. 7-25; 87-5366 Pet. 11-13) that the outrageous conduct of the government agents bars their prosecutions. Petitioner Anderson also disputes the court of appeals' conclusions about the facts of the case and contends that the court of appeals reviewed the district court's decision under the wrong standard of review (87-5366 Pet. 11-15).

Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss the indictment more than three years ago, when the indictment was originally returned. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are

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[1] The court of appeals also affirmed an order of the district court suppressing court-authorized wiretap evidence on the ground that specific facts that were withheld from the issuing judge about the investigation would have suggested that traditional techniques could have led to the successful infiltration of the heroin enterprise.

affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of final judgments of conviction. Accordingly, review of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[2] Because this case is interlocutory, we are not responding on the merits to the questions presented by the petitions. We will file a response on the merits if the Court requests.

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